No. 86-792

In the Supreme Court of the United States

OCTOBER TERM, 1986

LEOPOLD KOPPEL AND PAUL KOPPEL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

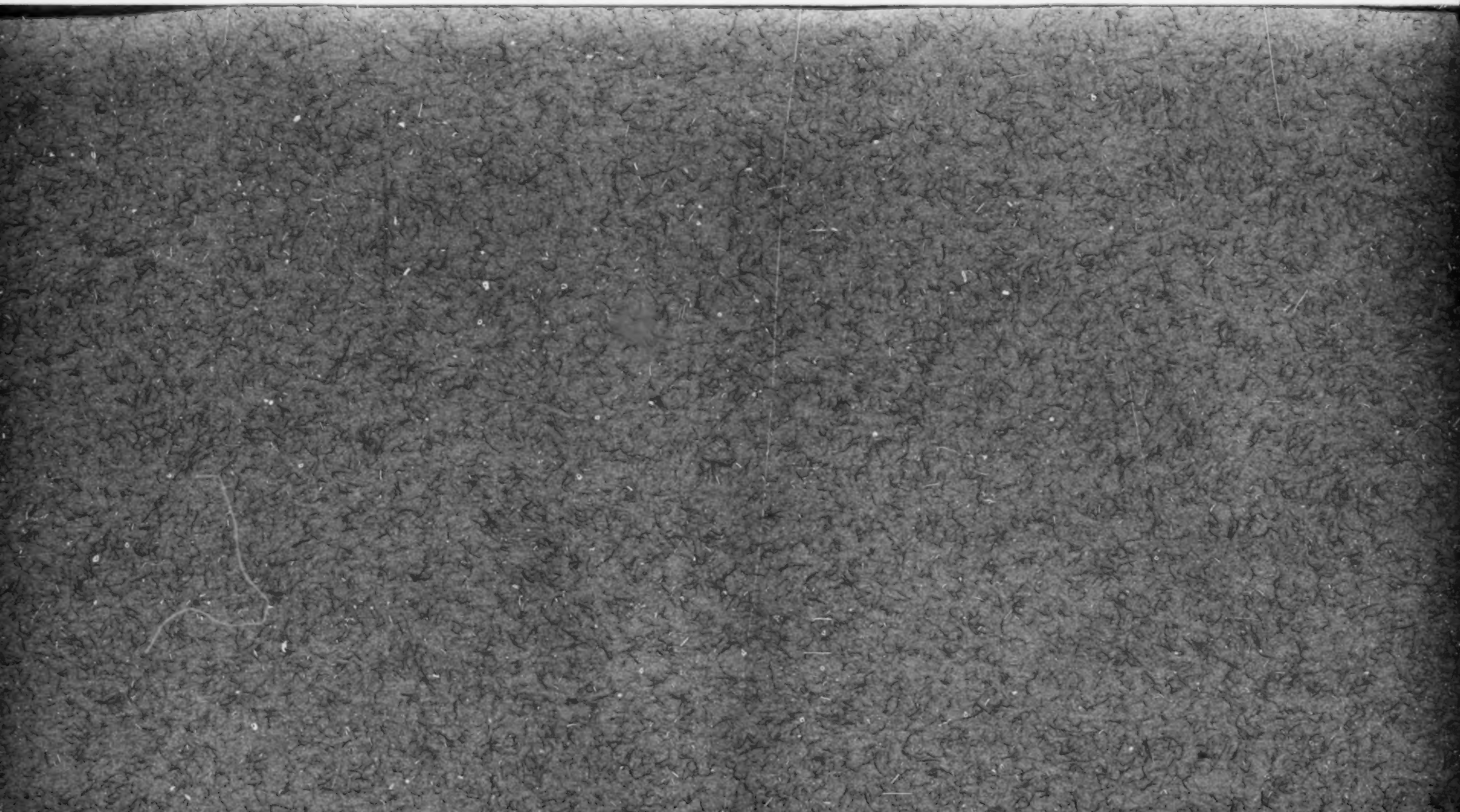
BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217



QUESTIONS PRESENTED

1. Whether the district court's jury charge directed a verdict on an essential element of a violation of the Federal Meat Inspection Act, 21 U.S.C. (& Supp. III) 601 *et seq.*

2. Whether the district court erred in denying petitioners' motion for a new trial based on allegations that the government failed to disclose the names of two witnesses who may have provided exculpatory testimony.

3. Whether the indictment charged, and the evidence at trial proved, a felony violation of the Federal Meat Inspection Act, 21 U.S.C. (& Supp. III) 601 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-792

LEOPOLD KOPPEL AND PAUL KOPPEL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1986. The petition for a writ of certiorari was filed on November 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of New York, petitioners were each convicted on one count of selling,

offering to sell, or transporting adulterated meat, in violation of the Federal Meat Inspection Act, 21 U.S.C. (& Supp. III) 601 *et seq.* (Pet. App. 1a). Petitioner Leopold Koppel was sentenced to 6 months' imprisonment, to be followed by 18 months' probation, and he was fined $10,000. Petitioner Paul Koppel was sentenced to two years' probation, and he was fined $10,000. The court of appeals affirmed in an unpublished order (Pet. App. 1a-2a).

1. The evidence at trial showed that petitioners engaged in the sale of adulterated meat through their operation of the Fort Plain Packing Co., Inc., a cattle slaughter house that produced boneless beef to be sold for processing into prepared foodstuffs for human consumption. Before the plant closed in November 1984, petitioners stored, processed, and packed meat at the plant under unsanitary conditions in which the meat may have become contaminated. Specifically, petitioners picked meat off the floor and placed it into containers of edible meat to be sold (C.A. App. 111-113, 485-486, 503, 521-522, 530-532, 542-543, 552-553; see also *id.* at 353-354, 419, 432-433, 446, 456, 472-473, 474-475, 476-477, 519-521). In addition, petitioners retrieved bones from containers of inedible meat and directed employees to retrim the bones to obtain more meat (*id.* at 115-117, 361-362, 421, 434-435, 450-451).[1] Petitioners also turned off the sterilizers that were used to clean the meat cutting knives and used dirty meat hooks during the processing operations (*id.* at 359-360, 411, 420-422, 436, 477,

[1] The containers of inedible meat were receptacles into which paper, bones, abscesses, and other trash were disposed (C.A. App. 146). Nothing placed into those containers was supposed to be removed and used in the meat processing operation (*id.* at 149-150).

496-498, 532-533, 554-555). Petitioners sold the adulterated meat to meat plants throughout the United States and Canada (*id.* at 192-195, 260-263).

2. At a pretrial hearing on January 8, 1986, the district court ordered the government to provide petitioners with the names of all former employees interviewed by the government who gave "negative statements," *i.e.*, employees who stated that they did not observe petitioners engaging in any unlawful activities (C.A. App. 15-16). By letter dated April 8, 1986, the government disclosed the names of ten such employees to petitioners (*id.* at 860).

The following day, which was approximately a week before trial, the prosecutor spoke to two former employees, Cook and Skottke, who had been interviewed in March 1985 during the investigative stage of the case (C.A. App. 886-888, 891). During their initial interviews, the two employees had described certain activities they observed at the plant that inculpated petitioners (*id.* at 883). An investigator from the Department of Agriculture accompanying the prosecutor had made written notes of those interviews (*id.* at 868-869). When the prosecutor spoke to the two employees the second time shortly before trial, however, neither employee repeated his earlier inculpatory statements, and both appeared reluctant to testify (*id.* at 890). On the first day of trial, the prosecutor turned over the investigator's notes of the March 1985 interviews with Cook and Skottke to ensure compliance with the Jencks Act, 18 U.S.C. 3500 (C.A. App. 891). Neither Cook nor Skottke, however, testified at trial (*id.* at 890).

After the trial, Cook and Skottke approached petitioners. Each claimed that he would have testified that he did not observe any of the activities described

by the other employees who testified for the government (C.A. App. 917). Petitioners subsequently filed a motion for a new trial, supported by affidavits from Cook and Skottke (*id.* at 861-864). Petitioners argued that the government had deliberately suppressed exculpatory evidence. Because the motion was filed more than seven days after the judgment, the district court denied it as untimely under Fed. R. Crim. P. 33 (C.A. App. 914-915). Petitioners then moved for a new trial based on newly discovered evidence (*id.* at 915). At a hearing on July 1, 1986, the district court denied the second motion. The court ruled, first, that the new motion was essentially the same as the first motion and therefore should similarly be deemed time-barred. Second, the court ruled that on the merits of their claim petitioners had failed to satisfy the standards for a new trial based on newly discovered evidence (*id.* at 915-916).

ARGUMENT

1. Petitioners contend (Pet. 10, 13-15) that a jury instruction given by the district court effectively directed a guilty verdict, thereby depriving petitioners of their Sixth Amendment right to a trial by jury. The court of appeals properly rejected that contention.

Petitioners' principal defense at trial was that the meat taken by petitioners from the floor was reconditioned to remove contaminants before the meat was placed in the edible meat containers (see Pet. 14). Petitioners accordingly requested that the district court instruct the jury that "picking meat up off the floor and placing it in somebody's pocket is not a violation of any kind" (C.A. App. 843). The district court gave the requested instruction as part of the

jury charge, and added: "Taking [the meat] out of their pocket later on and putting it in an edible meat container, that is. The mere picking it up is no violation" (*ibid.*).

Contrary to petitioners' contention (Pet. 13-15), the additional jury instruction did not undermine petitioners' defense by directing the jury to find that meat picked up from the floor, even if subsequently reconditioned, was adulterated within the meaning of the Federal Meat Inspection Act. As the court of appeals correctly found (Pet. App. 2a), the district court properly instructed the jury on the essential element of "adulteration." The district court specifically instructed the jury that it must find that the meat was adulterated; the court defined "adulterated meat" to mean "meat which has been prepared, packed or held under insanitary conditions where it may have become contaminated with filth or where it may have been rendered injurious to health"; and the court explained that filth meant "dirt or contaminants of any kind in the common and ordinary sense." C.A. App. 842. The district court did not suggest to the jury that meat taken from the floor could not be placed in edible meat containers after it had been reconditioned;[2] the court did no more

[2] Three inspectors from the Department of Agriculture testified that meat picked up from the floor could be placed in the edible meat containers if it was reconditioned under their supervision. Although petitioners now complain (Pet. 15) that the district court did not instruct the jury that it was lawful to place reconditioned meat in edible meat containers, petitioners never requested that the court give such an instruction (C.A. App. 810-816). During the objections following the charge, defense counsel merely asked the district court "to qualify that [instruction]" without specifying what the jury should be told (*id.* at 853).

than instruct the jury that meat picked up from the floor was filthy and could not be placed directly (*i.e.*, without proper reconditioning) into an edible meat container without violating the Federal Meat Inspection Act.[3] The district court's charge was therefore not a directed verdict at all, but merely an appropriate qualification to the charge requested by petitioners, which otherwise could have misled the jury into believing that recovering meat from the floor could not be part of a course of illegal conduct. The court's instruction was therefore not misleading, particularly when "viewed in the context of the overall charge." *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973); *Boyd* v. *United States*, 271 U.S. 104, 107-108 (1926).

2. Petitioners contend (Pet. 11-12, 15-18) that the government concealed the names of two former employees (Cook and Skottke) of the Fort Plain Packing plant who would have provided exculpatory testimony, and that the government's conduct denied them a fair trial. In particular, petitioners contend that the government violated the district court's order requiring disclosure of exculpatory testimony and that the district court should have applied a less stringent standard for granting a new trial. The government, however, did not violate the district court's order. Moreover, the district court applied the correct stand-

---

[3] Petitioners' contention (Pet. 15) that the district court's additional instruction directed a verdict on the element of transportation is similarly without merit in light of the district court's clear instruction that the jury was required to find that petitioners sold, transported, or offered to sell the adulterated meat in commerce (C.A. App. 842). In any event, petitioners failed to raise this issue before either the district court or the court of appeals.

ard of review and petitioners' claim that they were denied a fair trial lacks merit.

The district court found "absolutely no [merit] to [petitioners'] claim of prosecutorial misconduct by suppressing evidence" (C.A. App. 919). As the district court found (*id.* at 917-918), both employees *inculpated* petitioners during the March 1985 interview. The government therefore had no obligation to identify either employee under the court's disclosure order.[4] Moreover, because the district court correctly found that the government did not violate its duty to turn over exculpatory material to petitioners, it did not err in denying a new trial and in applying the traditional test for reviewing a motion for a new trial based on newly discovered evidence.

In any event, petitioners would not be entitled to a new trial even if the evidence withheld had been regarded as exculpatory. Government suppression of favorable evidence violates due process only where the evidence is material to the determination of guilt. *United States* v. *Agurs*, 427 U.S. 97, 107-110 (1976); *Brady* v. *Maryland*, 373 U.S. 83, 104 (1963). And evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 14. There is no such "reasonable probability" of a different result in this case. The testimony of 12 former employees supported the jury's finding that petitioners violated the Federal

[4] The district court further found (C.A. App. 919) that the government could not have suppressed the names of these two employees because, as petitioners concede (Pet. 17), they knew about the existence of the two employees at the time of trial.

Meat Inspection Act. As the district court found (C.A. App. 920), even if Cook and Skottke had testified that they did not make similar observations, "it is highly unlikely, if not impossible, that the[ir] testimony * * * would have 'probably led to acquittal' " (*ibid.*). Neither man claimed to have observed all of petitioners' activities and, as the district court pointed out (*id.* at 919), "the government could have easily impeached [Cook and Skottke] with their prior inculpatory statements."

3. Finally, petitioners contend (Pet. 12-13, 18-24) that the district court improperly imposed felony sentences when petitioners were charged with and convicted only of misdemeanor violations of the Federal Meat Inspection Act. The court of appeals properly rejected that claim (Pet. App. 2a).

The indictment charged (C.A. App. I3-14) that petitioners "did willfully and knowingly sell, transport, or offer for sale in commerce" adulterated meat, in violation of the Federal Meat Inspection Act, 21 U.S.C. 610(c). Petitioners were sentenced under 21 U.S.C. 676(a). That section generally sets forth misdemeanor penalties for violations of the Act, but it also provides for the imposition of felony penalties "if such violation involves * * * any distribution or attempted distribution of an article that is adulterated." In this case, felony penalties were appropriate because, as the court of appeals found (Pet. App. 2a), the language of the indictment was "the functional equivalent of the term 'distribution' as used in [the Act]," and the evidence at trial plainly established that petitioners distributed adulterated meat by selling it to other meat plants.[5] Indeed, the court

---

[5] As the district court observed (C.A. App. 930), the Federal Meat Inspection Act, 21 U.S.C. 610, does not specifically

of appeals rejected (Pet. App. 2a) petitioners' challenge to the sufficiency of the evidence to show that the adulterated meat entered into commerce.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

JANUARY 1987

---

prohibit the distribution of adulterated meat, but it does provide that a violation which "involves" the "distribution" of adulterated meat is a felony. See 21 U.S.C. 676(a). It is reasonable to presume that Congress intended that the sale of adulterated meat, which necessarily involves distribution, would be punished as a felony. Contrary to petitioners' assertion (Pet. 23), *United States* v. *Cattle King Packing Co.*, 793 F.2d 232 (10th Cir. 1986), cert. denied, No. 86-365 (Dec. 1, 1986), does not suggest a different result. *Cattle King* involved a felony prosecution under the Federal Meat Inspection Act based on defendants' intent to defraud (*id.* at 240-241). Hence, the Tenth Circuit in that case did not address the issue raised in this case regarding the meaning of "distribution" in the penalty provision of the Act.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40184